vient owner,[17] or for frightening [18] or shooting [19] his game, becomes a trespasser upon the servient tenement. And one in the pretended exercise of an easement of navigation over privately owned subaqueous land, who takes ice [20] from the surface or gravel [21] from the bed of the stream is likewise clearly a trespasser. The argument that as fish and game have no owner, anyone has a right to take them wherever he has a right to be,[22] is thus answerable in that the taker has no right on the highway for that purpose. On these grounds the majority of the courts have reached a result opposed to that of the principal case.[23]

THE DEVELOPMENT OF WHITBY *v.* MITCHELL. — The recent case of *In re Park's Settlement*, [1914] 1 Ch. 595,[1] contains a new application of the rule in *Whitby* v. *Mitchell*,[2] against limiting land to an unborn person for life, with remainder to the issue of that person, which, according to *In re Nash*,[3] is the modern English form of the old rule against a possibility upon a possibility. In *Park's Settlement*, land was limited (in the events that happened) to the use of John Foran for life, and after his death, if he left a widow surviving him, to the use of such widow for her life, and after her decease, if he left issue surviving him, to such issue or such of them as should attain the age of twenty-one years. John Foran was a bachelor at the date of the deed and afterwards married and had one child. His wife and child survived him, and on the death of his wife, the validity of the limitation to his issue was questioned on the ground that, as he, being a bachelor, might have married a lady unborn at the date of the deed, the limitation of a remainder to children who might be born of her as his wife, following a limitation to her for life, offended against the rule. Eve, J., held that the contention was well founded, and that the limitation to the issue was void. If this is a correct application of the rule, it seems to open up the way to new and unexpected catastrophes. It does not seem to be material that John Foran was a bachelor, for, if he had been married and his wife and child had been living at the date of the deed, it was possible that they might have died, and that another wife (unborn at the date of the deed) and another child might have survived him. And, if the child of the first marriage in fact survived, he could not take under the limitation, because, until the event, it was possible that he might have died, and a child of the second marriage, and not he, might have survived. As the

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[17] Adams *v.* Rivers, 11 Barb. (N. Y.) 390.
[18] Harrison *v.* Rutland, [1893] 1 Q. B. 142.
[19] The Queen *v.* Pratt, 4 E. & B. 860; L. Realty Co. *v.* Johnson, 92 Minn. 363, 100 N. W. 94.
[20] Washington Ice Co. *v.* Shortall, 101 Ill. 46.
[21] Archer *v.* Greenville Sand & Gravel Co., 34 Sup. Ct. 567.
[22] See dissent in Sterling *v.* Jackson, 69 Mich. 488, 519, 37 N. W. 845, 861.
[23] Hunting — Schulte *v.* Warren, 218 Ill. 108, 75 N. E. 783; Sterling *v.* Jackson, 69 Mich. 488, 37 N. W. 845; State *v.* Shannon, 36 Oh. St. 423; fishing — Hooker *v.* Cummings, 20 Johns. (N. Y.) 90; Adams *v.* Pease, 2 Conn. 481.

[1] The case is also reported 58 Sol. J. 362.
[2] 42 Ch. D. 494, 44 Ch. D. 85 (1890).
[3] [1910] 1 Ch. D. pp. 9–10.

limitation must have been good or bad at the date of the deed, the subsequent events would not affect it. So a testator might devise land to a son for life, with remainder to his son's children in fee, and with power for the son to appoint a life estate to his widow in precedence of the remainder to the children. If the son were young at the testator's death, he would very likely marry a wife unborn at that time, and, if he exercised the power in her favor by appointing a life estate to her, the remainder to his children in fee would be rendered invalid. Lord Coke would probably have managed this better with his rule regarding common possibilities and double possibilities.[4] He would have said that, the remainder after the life estate of John Foran's widow, being limited, not to *her* children, but to *his*, was good, because it was only a common possibility that he might marry somebody and have issue surviving him, which would not have involved inquiring whether the widow was the mother or when she was born. He would not have been likely to think that this remainder was affected by the triple possibility of his marrying an unborn wife, and having issue by that wife, and leaving both the wife and such issue surviving him. Perhaps a similar course might have been followed with the modern form of the rule, on the ground that the case was not within the reason of the rule, even if it might possibly be within its words. The case has nothing in common with *In re Frost*,[5] which was referred to in the judgment, because there the remainder was limited, not to issue living at the death of the first life tenant, but to issue living at the death of the survivor of the husband and wife, or, in default of such issue, to other persons then to be ascertained, and there was no issue. Kay, J., thought that involved the double possibility of a marriage with an unborn person and of the contingency to take effect upon the death of that person. The rule in *Whitby* v. *Mitchell* seems inadequate to this case, although the remainder was clearly void according to the rule against perpetuities, if that rule was applicable, as Kay, J., also held that it was. On the other hand, the limitation in *Park's Settlement* was clearly valid according to the rule against perpetuities, and it vested at the same time as the widow's life estate and independently of it.

RECENT CASES.

BILLS AND NOTES — DEFENSES — WAIVER OF DEFENSE BY EXECUTION OF RENEWAL NOTE. — The defendant with knowledge of a right of recoupment for defective performance of a contract, gave a renewal note for the full amount of the original note. Any cross-action by the defendant was barred by the Statute of Limitations. *Held*, that the defendant cannot recoup his damages in an action on the renewal note. *Stewart* v. *Simon*, 163 S. W. 1135 (Ark.).

The proposition that a renewal note is subject to the same defenses as the original is not absolutely true. Where the original was tainted with illegality, the renewal note is no better. *Chapman* v. *Black*, 2 B. & A. 588; *Wynne* v.

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[4] 2 Rep. 51 b (1593); 1 Rep. 156 a (1598).
[5] 43 Ch. D. 246, 253 (1890).